**BEFORE THE**
**UNITED STATES DEPARTMENT OF TRANSPORTATION**
**WASHINGTON, D.C.**

| | | |
|---|---|---|
| **COMPUTER RESERVATION SYSTEM REGULATIONS** | : | |
| **Supplemental Advance Notice of Proposed Rulemaking** | : | **Docket OST-97-2881**<br>**Docket OST-97-3014**<br>**Docket OST-98-4775** |

**COMMENTS OF THE**
**AMERICAN SOCIETY OF TRAVEL AGENTS, INC.**

The American Society of Travel Agents, Inc. ("ASTA") submits these comments in response to the captioned Notice, issued in 65 Fed. Reg. 45551, July 24, 2000. In doing so, we abide by the Department's request that we not repeat arguments previous made in these dockets. We add here only the observation, developed further below, that the issues being considered now are far from the totality of issues that must be resolved in order to protect competition in the retail distribution of air transportation services. We again urge the Department in the strongest possible terms to bring the entire rule-making forward for final rounds of comments and action.

## I. INTRODUCTION AND STATEMENT OF POSITION.

As we read the Supplemental Notice, the Department has sought comment on the following issues:

- Does Section 411 of the Federal Aviation Act authorize the Department to regulate a CRS that is not owned, controlled or marketed by an airline?[1]
- Are the Department's earlier findings in adopting/continuing Part 255 still valid in that the practices prohibited thereby remain "unfair methods of competition?"
- If the Department retains jurisdiction over the CRS's in light of remaining airline ownership/marketing relationships, is there a need to continue such regulations or can market forces be counted upon to correct any continuing problems?
    - If so, should the rules somehow be adjusted to correspond with the degree of airline ownership?
- Assuming the Department has jurisdiction, should some or all of the CRS regulations be applied to airline/CRS presences on the Internet?
    - If so, why should on-line agencies be treated differently than "traditional" agencies?

ASTA's position is that: (1) if Section 411 of the Federal Aviation Act does not empower the Department to regulate a CRS that is not owned, controlled or marketed by

[1] We are aware of the recodification of the Federal Aviation Act, but will continue to use the old form of reference for sections of the Act.

an airline, and that does not qualify as a "ticket agent," the Federal Trade Commission would have full jurisdiction over CRS operations under Section 5 of the Federal Trade Commission Act, (2) the Department's earlier findings in adopting and continuing Part 255 are still valid – the practices prohibited thereby remain "unfair methods of competition, (3) assuming the Department retains jurisdiction over the CRS's in light of remaining airline ownership/marketing relationships, there is a compelling need to continue the CRS regulations -- in light of the formal and informal consolidation of the airline industry, market forces have no chance of controlling the anti-competitive, anti-consumer behavior of the airlines and the CRS's that they own or market, (4) it is neither practical nor necessary to adjust the CRS rules to correspond with the degree of airline ownership – any airline seeking to escape the rules need only terminate the relationships giving rise to the application of the rules, (5)

the CRS regulations should be applied to integrated displays offered directly to consumers on the Internet, [2] and (6) on-line agencies should not be treated differently than "traditional" agencies and would not under ASTA's recommended approach.

## I. IF SECTION 411 DOES NOT EXTEND TO NON-AIRLINE OWNED, CONTROLLED, OPERATED OR MARKETED, NON-TICKET AGENT ACTIVITIES, THE FEDERAL TRADE COMMISSION WOULD HAVE JURISDICTION.

The text of the CRS rules themselves make clear that, contrary to some popular understandings, the root of the Department's power to apply these rules to CRS

[2] For this purpose, "integrated display" is defined as in 14 CFR 255.3 with appropriate contextual modifications.

enterprises actually arises from, and is limited by, the Department's power to regulate the conduct of "air carriers" and "ticket agents," both of which terms are defined in section 101 of the Act. If there is no link, through ownership, control, operation or marketing between an airline and a "system" (defined in the regulations essentially as a computer program with certain information in it), the regulations cannot control what that "system" does. That is why, we believe, the rules state in the Applicability section that they apply to "air carriers" and "sales" of transportation by such carriers and add "each carrier [with the requisite relationship with a "system"] shall ensure that the system's operations comply" with the rules.[3] 14 CFR 255.2.

Were a CRS to have the required relationship with an air carrier, and assuming it were not judged to be a "ticket agent," the regulatory jurisdiction of the Department of Transportation over the CRS under current law would seem to cease. The issue would then arise as to whether that CRS was free to exercise its market power over travel agents and, ultimately over consumers, without restraint.

Section 5 of the Federal Trade Commission Act would then apply to the operations of that CRS.[4] Attempts by CRS's to exercise market power over travel agents and

---

[3] We are not aware of any airline owner or marketer of a CRS claiming that it is unable to comply with this mandate. For the present, therefore, no CRS may engage in the conduct proscribed by the CRS regulations. That is why the changes in CRS ownership by airlines have thus far not left any CRS free to exercise its market power against travel agencies or consumers.

[4] The FTC Act's exclusion of airlines would be irrelevant at this stage. The lever of jurisdiction over the airlines to assure jurisdiction over the CRS's would be gone but also unnecessary in that the FTC would have clear jurisdiction over the "independent" CRS firms.

airlines, in ways proscribed by the current CRS regulations and perhaps in other ways, would violate that section. This view is based in part upon the fact that Section 411 of the Federal Aviation Act, which is the statutory basis for DOT's CRS regulations, was intended to be, and has always been interpreted as, the analog of Section 5 of the FTC Act. Conduct that was judged to violate Section 411, and thus was prohibited by the CRS rules when DOT had jurisdiction over the CRS due to its airline relationships, would, in the absence of those relationships, surely violate Section 5.

The sensible thing to do then would be adoption by the FTC of a Trade Regulation Rule emulating the CRS regulations for non-airline owned CRS companies.

There are at least two ways to avoid this outcome. One is to make the finding that a CRS, when not owned by an airline, was a "ticket agent" under the Act. Given the terms of the definition of "ticket agent" in section 101, the basis for such a finding is not apparent.

The other way would be similar to the device used in the current CRS regulations. For example, to continue the prohibition against display bias, the Department could adopt a rule prohibiting any air carrier from providing consideration to any computer reservations system in order to secure "carrier identity based display preference." Without consideration, it is difficult to conceive of any incentive for a CRS to provide such display preference for a carrier with which it had no ownership, operational or marketing affiliation. Similar rules operating entirely on the airlines could be adopted to secure the protections afforded by the other CRS regulations that, by their current terms, appear to apply directly

to the CRS's but which are in reality dependent ultimately on their operation against the airlines.[5]

## II. THE PRACTICES PROHIBITED BY PART 255 REMAIN "UNFAIR METHODS OF COMPETITION" AND THE CRS REGULATIONS SHOULD BE CONTINUED.

The Supplemental Notice raises the question whether the conduct covered by Part 255 has somehow changed its character with the passage of time, the reduction in airline ownership and the emergence of the Internet. ASTA sees no basis for such a conclusion. Indeed, for the reasons set out in our lengthy comments on December 7, 1997 (which, as requested, we will not repeat here), the regulations need to be strengthened in numerous respects as there described.

The Supplemental Notice makes much to much of the notion that airlines have separated themselves from the CRS's. As we understand the current ownership arrangements, only one CRS, Sabre, is free of airline ownership. One, on the other hand, is still wholly owned by airlines (Worldspan), one is seventy-five percent owned by airlines (Amadeus) and one has the world's largest airline as a 17 percent shareholder[6] and a major European airline as a 7.5 percent owner (Galileo). As for Sabre, American Airlines

---

[5] Another example is the rule prohibiting carriers from tying GDS use by corporations.

[6] United has asked to be relieved of the CRS regulations, notwithstanding its ownership interest, a position ASTA has formally opposed (comments filed in this docket on October 29, 1999) and continues to oppose.

is still involved in a marketing relationship with the CRS and Sabre, therefore, remains subject to Part 255.

Under these circumstances there is no plausible basis to conclude that the owning/marketing airlines are going to behave neutrally in relation to their investments and commitments in and to the CRS's. The Internet may have given the airlines new opportunities to reach the consumer directly, but that fact has nothing to do with the airlines deeply rooted interest in protecting and nourishing their longstanding relationships with CRS which, not coincidentally, still process the vast majority of air travel transactions initiated by travel agencies both on-line and off-line. Under all foreseeable conditions over the next five years, and assuming that the government does not give the airlines carte blanche to jointly destroy third party distribution competitors, the Internet will account for a minority of airline sales.

Nothing in industry experience suggests that the airlines, given the opportunity, would not again attempt to leverage their CRS interests against competing airlines and against travel agencies. In fact, for the reasons cited in ASTA's complaint to the Department in Docket OST-99-6410 and in its complaint to the Department of Justice regarding Orbitz, dated February 16, 2000, there is more reason now than ever before to believe that airline market power will be used to the detriment of third party information sources and the millions of consumers who rely upon them.

To justify a finding that the conduct prohibited by Part 255 has become benign, the Department would have to find that the forces of competition were working effectively within the airline and CRS industries to such an extent that competitive outcomes could

routinely be expected. Given the current state of consolidation and inter-connectedness of the airline and CRS industries, such an expectation would surely be the height of fantasy. Unless and until someone comes forward with a facially plausible reason, other than "trust us," for the airlines to have changed their behavioral patterns, we will leave this topic.

## III. THE CRS RULES SHOULD NOT BE ADJUSTED TO CORRESPOND WITH THE DEGREE OF AIRLINE OWNERSHIP.

ASTA sees no practical way to have different rules based upon the degree of airline involvement in a CRS. To make such a differentiation would require findings that specific degrees of ownership create incentives to prejudice air transportation competition, as found in adopting and renewing the regulations in the past, while other degrees of ownership would not. These findings would have to be connected to other types of interests that airlines have or might acquire in CRS's. The Department would have to write a code of such complexity that no one could understand or follow it.

When Part 255 was created, the government, after extensive investigation, found that airline relationships of various kinds created incentives to distort competition in underlying downstream air transportation services. Nothing has occurred to change those findings or those expectations. If airlines believe they are on balance prejudiced by being subjected to CRS regulations, they are free to dispose of their interests in the CRS's. If they want to retain those interests, as United apparently does, they must take the consequences too, based upon a history for which they bear responsibility.

## IV. THE CRS REGULATIONS SHOULD BE APPLIED TO INTEGRATED DISPLAYS OFFERED DIRECTLY TO CONSUMERS ON THE INTERNET. [7]

ASTA addressed this issue at length in its comments filed in December, 1997. We maintain that position today: the rules should apply to integrated displays offered to the consumer directly. Jurisdiction to do this arises from Section 411 of the Act in that such displays are provided either by airlines, affiliates of airlines, or ticket agents. As requested in the Supplemental Notice, we will not repeat our comments filed earlier.

## V. APPLICATION OF THE CRS REGULATIONS TO ON-LINE AGENCIES SHOULD NOT AND WOULD NOT DISCRIMINATE AGAINST THEM.

It is not entirely clear to us why the Department raised this issue in the Supplemental Notice. The main reason for applying the CRS rules to on-line travel agencies, regardless of their ownership, is to prevent display bias from re-insinuating itself into the industry of selling travel at retail. The application of the CRS rules to integrated Internet displays, regardless of the purveyor, would prevent the sale of preferred positions to individual airlines. The outcome of applying the rules in this manner would be no different, in net effect, from the outcome of applying them to CRS displays seen by travel agencies: neither agencies nor consumers would be impacted by undisclosed algorhythm manipulations. In that sense all retailers would be treated the same and there would be no “unjust” discrimination between the two types of retailers.

---

[7] For this purpose, “integrated display” is defined as in 14 CFR 255.3 with appropriate contextual modifications.

The Department must be careful not to assign too much weight to the idea of the "on-line" agency. The retail industry is evolving rapidly and many agencies are true hybrids of "bricks and mortar" and "on-line" business applications. More than ever before the industry is characterized by a full spectrum of business models, involving different uses or combinations of technology and traditional methods of providing information and concluding transactions.

For that reason and because the CRS rules also were designed to protect retailers from the market power of the CRS's and the airlines, other aspects of the rules would have to be re-evaluated in detail once the decision is made to apply them to the Internet. This part of the rule-making apparently was not intended for that purpose. It will, however, be crucially important to finish the proceeding with that detailed examination to determine the extent to which it remains appropriate to continue regulatory control of contract terms and the content of such control.

We have asked the Department repeatedly to do something about the portion of the CRS regulations that deals with the airlines' sharing of marketing information tapes generated by the CRS's. This is a vital top-priority issue that desperately needs review to assure that competition remains both functional and fair in the sale of air transportation services. The Air Carrier Association of America recently filed a paper in these dockets on this subject and we agree generally with the analysis in that pleading.
In our 1997 comments we gave the Department a detailed solution to the issue and urge that it be brought forward for comment and expeditious final action.

Respectfully submitted,

Paul M. Ruden
Attorney for the American
Society of Travel Agents, Inc.

September 20, 2000